United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2667 B

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UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

PASQUALE A. NATARELLI,
a/k/a PAT NATARELLI,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Docket No. 74-2667

BRIEF FOR PETITIONER-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

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PRELIMINARY STATEMENT

This is an appeal from a decision and order of the HONORABLE HAROLD P. BURKE, United States District Judge, entered in the Western District of New York, on the 20th day of November, 1974. (A-1) By this order the Court below denied Appellant's application (A-7) pursuant to Title 18 United States Code 2255, for the vacation of certain sentences imposed upon Appellant pursuant to a judgment of conviction entered the 11th day of December, 1967, in the United States District Court for the Western District of New York; and for an order directing resentence thereunder.

STATEMENT OF FACTS UPON WHICH APPELLANT BASED HIS APPLICATION BELOW.

By indictment returned the 18th day of August, 1967, (A-13) Appellant and four co-defendants were charged, in the Western District of New York, with two crimes of Conspiracy. The charge under the first count of the indictment was a violation of Title 18 U.S.C. 1951 and under the second count of the indictment the defendants were charged with a violation of Title 18 U.S.C. 371.

After trial by jury, a verdict was returned on the 21st day of November, 1967, finding Appellant and his co-defendants guilty under each count of the indictment. On the 11th day of December, 1967, the trial Court, the Honorable John O. Henderson, deceased, Presiding, imposed a term of 20 years imprisonment on the first count and five years imprisonment on the second count, as against the Appellant, and directed that the terms be served concurrently.

On direct appeal to this Court, the judgment of conviction was affirmed. On that appeal the issues presented by Appellant's application below, were neither briefed, argued nor determined.

In his application below, Appellant contended that only one Conspiracy was established on the trial of the indictment, and despite the fact that the Conspiracy envisioned the violation of more than one criminal provision, it was a single agreement constituting a single offense, and therefore, subject to a single punishment under the authority of Braverman vs United States, 317 U.S. 49.

The indictment had alleged the same criminal agreement in each count and the same overt acts for each count (See A-13 et seq.). Appellant also submitted portions of the Government's brief on the direct appeal herein (A-18) as evidence of the fact that the Government's own case was based upon the proposition that there was only one Conspiracy and that it was only one Conspiracy which the Government had established.

The Court below agreed with Appellant's contention that there was but one illicit agreement and, therefore, only one Conspiracy within the meaning of Braverman vs United States, supra. However, the Court denied Appellant's application on the ground that he was foreclosed from a collateral attack upon the judgment of conviction in absence of a constitutional question. (A-4-5).

QUESTIONS PRESENTED

1. Where a defendant is convicted under a two-count indictment, charging a separate crime of Conspiracy in each count, is it permissible to sentence him under both counts where the record clearly establishes that only one illegal agreement was in existence and that, therefore, there was but one Conspiracy with more than one object?

2. Where separate sentences on two counts are impermissible, is error in imposing such sentences cured by reason of the fact that they are imposed to run concurrently?

3. Is a defendant barred from attacking an impermissible and improper sentence in a proceeding brought pursuant to Title 28 U.S.C. 2255, because of his failure to raise the question on direct appeal from the judgment of conviction?

It is respectfully submitted that each of the foregoing questions must be answered in the negative, thus mandating a reversal of the decision and order below; the vacation of the sentences previously imposed upon Appellant and a direction that he be resentenced under only one count of the indictment.

POINT I

THE GRAVAMEN OF THE CRIME OF CONSPRIACY IS THE AGREEMENT TO COMMIT A CRIMINAL ACT, THEREFORE, REGARDLESS OF THE NUMBER OF ILLEGAL ACTIVITIES CONTEMPLATED BY THE AGREEMENT, IF THERE BE ONE AGREEMENT, THERE IS ONLY ONE CONSPIRACY.

The Court below sustained Appellant's contention that there was but one criminal plan contemplating the commission of two separate robberies, which formed the basis of the criminal Conspiracy charged by the Government. The Court below found that the overt acts alleged in each Conspiracy count were the same; that the proof established but one plan; and that the Government's brief on appeal was in and of itself convincing proof that the Government throughout the entire case regarded the plan as a single Conspiracy to commit two robberies. (A-4-5).

Since it is the criminal agreement which gives birth to the Conspiracy, the fact that such agreement contemplates the violation of more than one criminal statute, does not cause the

single agreement to ripen into two Conspiracies. (A-5); Braverman vs United States, supra; United States vs Mori, 444 F. 2d 240, (5th Cir., 1971).

Under the authority of Braverman vs United States, supra, despite the fact that one Conspiracy may violate more than one criminal provision, it is still only subject to a single punishment.

Therefore, the imposition of sentences under both counts of the indictment was improper and impermissible. Braverman vs United States, supra; United States vs Mori, supra.

POINT II

AN APPLICATION TO VACATE AND CORRECT AN IMPROPER AND IMPERMISSIBLE SENTENCE UNDER THE AUTHORITY OF TITLE 28 U.S.C. 2255, IS NOT BARRED BY REASON OF THE APPLICANT'S FAILURE TO RAISE THE QUESTION ON DIRECT APPEAL FROM THE JUDGMENT OF CONVICTION.

The Court below ruled that in the absence of a question involving the primary jurisdiction of the sentencing Court or a constitutional question, Appellant was foreclosed from a collateral attack upon the sentence by reason of his failure to raise the question on direct appeal. (A-5). The Court's decision in this regard was on the authority of Sunal vs Large, 332 U.S. 174.

We submit that the lower Court's reliance on Sunal vs Large, supra; was illfounded. The issue in that case was whether Section 2255 could be used as a vehicle for retroactive applica-

tion of a Supreme Court decision handed down after defendant's time to take a direct appeal had expired.

In the instant case the sentences imposed by the trial judge were impermissible at the time of imposition, they did not become so as a result of an intervening statute or judicial decision.

That a Section 2255 proceeding is a proper vehicle for raising the instant question is demonstrated by an examination of decisions handed down by this and other Appellate Courts in analogous situations.

We submit that the instant application was properly before the Court below under the authority of Gorman vs United States, 456 F. 2d 1258, (2nd Cir., 1972). That case involved the appeal from an order denying Section 2255 relief where the defendant had been sentenced under two counts of an indictment, each count of which involved a separate subdivision of 18 U.S.C. 2113 (the Federal Bank Robbery Statute). Dual sentences under such statute had been held impermissible under the authority of Prince vs United States, 352 U.S. 322. The petitioner Gorman had taken a direct appeal and the judgment of conviction had been affirmed. United States vs Gorman, 355 F. 2d 151, (2nd Cir., 1965). The question of improper sentence was neither argued nor determined on the direct appeal. On appeal from the decision in the Section 2255 proceeding, this Court reversed the Court below and granted relief on the application.

It is submitted that there is neither substantive nor procedural distinction between the imposition of an improper dual sentence on a Section 2113 conviction for bank robbery and a dual

sentence on Conspiracy convictions where only one Conspiracy existed; therefore, the remedy afforded by Section 2255 is available to a defendant improperly sentenced under the principles enunciated in Braverman vs United States, supra; regardless of whether he took a direct appeal from the judgment of conviction. Garza vs United States, 498 F. 2d 1066, (5th Cir., 1974); McFarland vs Pickett, 469 F. 2d 1277, (7th Cir., 1972); Clermont vs United States, 432 F. 2d 1215, (9th Cir., 1970); Rose vs United States, 448 F. 2d 389 (5th Cir., 1971); Sullivan vs United States, 485 F. 2nd 1352 (5th Cir., 1973).

POINT III

THAT CONCURRENT RATHER THAN CONSECUTIVE SENTENCES WERE IMPOSED IN THE INSTANT CASE, IN NO WAY MILITATES AGAINST THE DEFENDANT'S ENTITLEMENT TO THE RELIEF SOUGHT.

It is established that there is no jurisdictional bar to a consideration of challenges to multiple convictions even though concurrent sentences were imposed. Benton vs Maryland, 395 U.S. 784. In its answer to the petition below, the Government argued that Appellant's claim has been rendered moot by reason of the concurrent sentences. In making this argument, it relied upon United States vs Berlin, 372 U.S. 1002 (2nd Cir., 1973); and United States vs Marino, 421 F. 2d 640 (2nd Cir., 1970). We respectfully submit that these cases are readily distinguishable from and have no application to the instant case. In both cases, this Court, on direct appeals from judgments of conviction under multicount indictments, reversed the convictions as to some counts and affirmed as to others,

it did not remand for resentencing because concurrent sentences had been given and the range of the sentences were within the permissible limits for the affirmed counts. The distinction between the Berlin and Marino cases, and United States vs Mori, supra; which directed a resentence despite concurrent sentences, is that in Mori as in the instant case, the conviction under each count was a proper one but despite the propriety of the conviction, the dual sentence was impermissible and the Court was without proper authority to impose both sentences in the first instance. In the Berlin and Marino cases, however, it was the conviction which was improper and the error was cured by the mere reversal thereof.

The procedure followed in United States vs Mori, supra, was based upon that followed in United States vs White, 440 F. 2d 978 (5th Cir., 1971); and the same as that followed in McFarland vs Pickett, supra.

Appellant submits, therefore, that the proper remedy in the instant case is a vacation of both sentences and a remand for resentencing. Appellant further submits that the procedure used by this Court in Gorman vs United States, supra; and the recent case of United States vs Pravato, 505 F. 2d 703 (2nd Cir., 1974) is not properly applicable to the instant case. In Gorman sentence on one count of the indictment was allowed to stand and sentence on the other count was merely vacated, with no remand for resentencing. The opinion stresses, quite clearly, however, that the nature of the trial court's sentence on the second count was such as to indicate that the Court was aware of the fact that he had no authority to pyramid sentences and that the Court was attempting to comply

with the dilemma created as a result of the decision in Prince vs United States, supra. The sentence vacated in Gorman, was as pointed out in the opinion no sentence at all, for practical purposes. In the instant case, both sentences imposed were for a substantial number of years, unlike the suspended sentence and three-minute probation imposed under the sentence vacated in Gorman vs United States, supra.

Thus proper relief in the instant case mandates adherence to the general rule enunciated in United States vs White, supra; and United States vs Mori, supra; rather than an exception thereto.

CONCLUSION

The order of the Court below should be reversed; and the relief demanded by Appellant should be in all respects granted.

Respectfully submitted,

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STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

SUZANNE BROWNSTEIN, being duly sworn, deposes and says:

That on the 29th day of January, 1975, she personally served three copies each of Brief for Petitioner-Appellant and Appendix of Petitioner-Appellant on Theodore J. Burns, Assistant United States Attorney, United States Attorney's Office, Western District of New York, 68 Court Street, Buffalo, New York.

Suzanne Brownstein
Suzanne Brownstein

Sworn to before me this
30th day of January, 1975

Lucile M. Rogers
Notary Public, Erie Co., N.Y.
My Comm Exp. 3/30/75